

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOUIS DEVINCENTIS,

Petitioner,

v.

KENNETH QUINN,

Respondent.

NO. C06-680JLR-JPD

ORDER

I. INTRODUCTION

This matter comes before the court on Petitioner Louis DeVinentis's motion for a certificate of appealability under 28 U.S.C. § 2253(c) (Dkt. # 24). Mr. DeVinentis seeks to appeal the court's April 5, 2007 order denying his habeas corpus petition (Dkt. # 21). For the reasons stated below, the court GRANTS in part and DENIES in part the motion (Dkt. # 24).

II. BACKGROUND

Following a bench trial in 2000, Petitioner Louis DeVinentis was convicted of rape of a child in the second degree and child molestation in the second degree. The trial court, taking into account Mr. DeVinentis's two prior convictions in New York for sex

1 abuse, sentenced him to 240 months, a term that falls within the standard range. Mr.
2 DeVincentis appealed, and the state appellate courts affirmed his conviction and
3 sentence. State v. DeVincentis, 47 P.3d 606 (Wash. Ct. App. 2002); State v.
4 DeVincentis, 74 P.3d 119 (Wash. 2003). Mr. DeVincentis then filed a personal restraint
5 petition, which the Washington Court of Appeals dismissed and the Washington Supreme
6 Court denied review.

7
8 Having properly exhausted his state court remedies, Mr. DeVincentis petitioned
9 this court for a writ of habeas corpus under 28 U.S.C. § 2254, asserting four grounds for
10 relief. First, Mr. DeVincentis argues that his trial counsel rendered ineffective assistance
11 by failing to “investigate further” to exclude a prior victim’s testimony, which the trial
12 judge admitted to show a common plan. Second, he contends that his lawyer rendered
13 ineffective assistance by failing to inform him of his right to testify at an evidentiary
14 hearing on the admissibility of this testimony. Third, Mr. DeVincentis asserts that this
15 alleged failure violated his constitutional right to testify at the evidentiary hearing.
16 Finally, Mr. DeVincentis claims that the trial court denied his right to have a jury
17 determine whether his two prior New York convictions were “comparable” to the
18 Washington crimes for purposes of calculating his offender score and imposing an
19 increased sentence. This court denied Mr. DeVincentis’s habeas petition in its order
20 adopting the Magistrate Judge’s Report and Recommendation (“R&R”) (Dkt. # 21). Mr.
21 DeVincentis now moves for a certificate of appealability.
22

23 **III. ANALYSIS**

24
25 Among the substantial changes in the Antiterrorism and Effective Death Penalty
26 Act of 1996 (“AEDPA”) is a rule that a habeas petitioner can appeal the denial of a 28
27 U.S.C. § 2254 petition only after obtaining a “certificate of appealability.” 28 U.S.C.
28 § 2253(c). Although the statute is ambiguous, the Ninth Circuit has held that a United

1 States District Court may issue a certificate of appealability. United States v. Asrar, 116
2 F.3d 1268, 1269 (9th Cir. 1997). A court may issue a certificate of appealability only if
3 the “applicant has made a substantial showing of the denial of a constitutional right.” 28
4 U.S.C. § 2253(c)(2). The Supreme Court has elaborated that a petitioner must show that
5 “reasonable jurists could debate whether . . . the petition should have been resolved in a
6 different manner or that the issues presented were adequate to deserve encouragement to
7 proceed further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotations
8 omitted). The decision to issue a certificate of appealability turns not on the court’s
9 assessment of the applicant’s chances for success on appeal, but whether the appeal
10 would raise material and debatable questions. Miller-El v. Cockrell, 537 U.S. 322, 342
11 (2003) (noting that courts must focus on “the debatability of the underlying constitutional
12 claim, not the resolution of that debate”). Indeed, a claim is debatable “even though
13 every jurist of reason might agree, after the [certificate] has been granted and the case
14 received full consideration, that petitioner will not prevail.” Id. at 338.

17 Here, the dismissal of Mr. DeVincentis’s habeas petition warrants a certificate of
18 appealability only as to his first and fourth grounds for relief. As to his first claim, Mr.
19 DeVincentis argues that the declarations of his daughter, son, and ex-wife show that he
20 did not gradually groom the prior victim in a similar manner to the Washington crimes for
21 admissibility purposes. He contends that if trial counsel had interviewed his family
22 members, he would have discovered enough impeachment evidence to persuade the trial
23 court to exclude the prior victim’s testimony.¹ The Court of Appeals evaluated these
24 claims under Strickland v. Washington, 466 U.S. 668 (1984), and concluded that the
25

26
27 ¹ The trial judge agreed with the prosecution that the prior victim’s testimony showed Mr.
28 DeVincentis engaged in the common plan of getting to know young girls through a safe channel,
gradually desensitizing them to the sight of him in bikini underwear, and then bringing them into
an apparently safe environment where he abused them. The Washington Supreme Court upheld
the trial court’s evidentiary ruling. See DeVincentis, 74 P.3d 119 at 126.

1 family members' affidavits "would not have rebutted [the prior victim's] testimony, and
2 there is no reasonable probability that they would have altered the result of the
3 [evidentiary] hearing." Admin. R. (Dkt # 11), Ex. 17 at 3. The Supreme Court
4 Commissioner agreed, and added that trial counsel "was not professionally deficient in
5 declining to call witnesses whose impartiality could be questioned and through whom Mr.
6 DeVicentis's past abuse might be further explored." *Id.* at Ex. 19 at 4. This court found
7 the state courts' conclusions objectively reasonable under AEDPA. Given the fact-
8 specific inquiry involved in ineffective assistance claims, however, the court concludes
9 that reasonable jurists could disagree.
10

11 As to his second and third grounds for relief, Mr. DeVincentis argues that he had a
12 constitutional right to testify at the evidentiary hearing on the prior victim's testimony,
13 and that his trial counsel's failure to inform him of that right constituted ineffective
14 assistance. He contends that his general right to testify on his own behalf extends to the
15 pretrial hearing context, though he admits he cannot point to any binding authority for
16 that proposition. Mot. at 19. This court did not disturb the state rulings rejecting these
17 claims because Mr. DeVincentis could not show the disposition was contrary to, or an
18 unreasonable application of, *clearly established* federal law.² Absent a Supreme Court
19 holding directly on point, the court must deny Mr. DeVincentis a certificate of
20 appealability as to his second and third claims regarding his right to testify at the pretrial
21 evidentiary hearing. *See Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (holding that "it
22 cannot be said that the state court 'unreasonably applied clearly established Federal
23
24
25
26

27 ² Under AEDPA, the phrase "clearly established federal law, as determined by the
28 Supreme Court" refers to the holdings, as opposed to dicta, of the Supreme Court's decisions as
of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000)
(citing 28 U.S.C. § 2254(d)(1)).

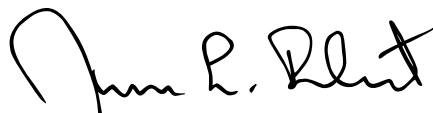
1 law,”” where no Supreme Court ruling directly addressed the potential prejudice caused
2 by spectators’ courtroom conduct).

3 Finally, Mr. DeVincentis claims that the trial court denied his right to have a jury
4 determine whether his New York convictions were “comparable” to the Washington
5 crimes for sentencing purposes. A key difference, he argues, is that the New York
6 criminal statute does not specify whether the government must prove a non-marital
7 relationship between the defendant and the victim. This court dismissed that claim by
8 adopting the Magistrate Judge’s R&R, which reasoned that Blakely v. Washington, 542
9 U.S. 296 (2004), cannot be applied retroactively to upset a final conviction. See Schardt
10 v. Payne, 414 F.3d 1025 (9th Cir. 2005) (holding that retroactive application of the
11 Blakely rule is barred under 28 U.S.C. § 2254(d) and Teague v. Lane, 489 U.S. 288
12 (1989)). The court finds tenuous Mr. DeVincentis’s argument that the New York and
13 Washington offenses are not comparable because of Washington’s so-called non-
14 marriage requirement. Nonetheless, the court agrees that reasonable jurists could debate
15 whether Blakely announced a new rule, or simply applied the rule announced in Apprendi
16 v. New Jersey, 533 U.S. 466 (2000), and disagree about the correct application of those
17 decisions. See Burton v. Stewart, 127 S. Ct. 793, 794 (2007) (granting certiorati to
18 determine whether Blakely announced a new rule, but declining to resolve issue based on
19 jurisdictional constraints).

22 IV. CONCLUSION

23 For the foregoing reasons, Mr. DeVincentis’s application for a certificate of
24 appealability is GRANTED in part and DENIED in part (Dkt. # 24).

25 Dated this 16th day of May, 2006.

26
27
28 

JAMES L. ROBART
United States District Judge